NO 80-6600

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

TYRONE C. WILLIAMS :

Petitioner :

vs. :

THE STATE OF OHIO :

Respondent :

ORIGINAL COPY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO.

Simon L. Leis, Jr.
Prosecuting Attorney

William E. Breyer
Assistant Prosecuting Attorney
Counsel of Record

Leonard Kirschner
Chief Ass't Prosecuting Attorney
Appellate Division

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Respondent

Opposing Counsel

H. Fred Hoefle
Attorney at Law
400 Second National Building
830 Main Street
Cincinnati, Ohio 45202

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED	1
JURISDICTION	2
CONSTITUTIONAL & STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	5
REASONS FOR DENYING WRIT	12
CONCLUSION	30
CERTIFICATION	31

TABLE OF AUTHORITIES

	Page
CASES:	
Blockburger v. United States, 284 U.S. 299 (1932)	27,28, 29
Brewer v. Williams, 430 U.S. 387 (1977)	16
Brown v. Alabama, 619 F. 2d 376 (C/A 5, 1980)	27
Burks v. United States, 98 S. Ct. 2141 (1978)	12
Busic v. United States, ___ U.S. ___, 100 S. Ct. 1747 (1980)	27
Cardinale v. Louisiana, 394 U.S. 437 (1969)	26
Chapman v. California, 386 U.S. 18 (1967)	17,22
Com. v. Sparrow, 370 A. 2d 712 (Pa. 1977)	28
Hill v. Whealon, 490 F. 2d 629 (1972)	14
Holt v. United States, 218 U.S. 245 ( )	20
Illinois v. Vitale, 100 S. Ct. 2260 (1980)	27
Irvin v. Dowd, 366 U.S. 717 (1961)	20
Jenning v. United States, 391 F. 2d 512 (1968)	14
Mapp v. Ohio, 367 U.S. 643, n. 9 (1961)	21,23, 26
Mayes v. Sowders, 621 F. 2d 850 (C/A 6, 1980)	27
Michigan v. Moseley, 423 U.S. 96 (1975)	14
Mincey v. Arizona, 437 U.S. 385 (1978)	25
Miranda v. Arizona, 384 U.S. 436 (1966)	13
Nevels v. Parrott, 596 F. 2d 344 (1979)	22
North Carolina v. Pearce, 395 U.S. 711 (1969)	28
O'Connor v. Ohio, 385 U.S. 92 (1966)	23
Payton v. New York, 100 S. Ct. 1371 (1980)	23,24, 25
People v. Burton, 6 Cal. 3rd 375 (1975)	28
Reynolds v. United States, 98 U.S. 145 (1898)	20
Rhode Island v. Innis, ___ U.S. ___, 100 S. Ct. 1682 (1980)	15,16
State v. Adams, 530 S. 2d 223 (1978)	29
State v. Antill, 176 O.S. 61 (1964)	12
State v. Childs, 14 O.S. 2d 56 (1968)	21,23
State v. Cornelly, 56 O.S. 2d 1 (1978)	26
State v. Davis, 1 O.S. 2d 28 (1964)	21,23
State v. Davis, 44 O.A. 2d 335 (1975)	17
State v. DeHass, 10 O.S. 2d 230 (1967)	12
State v. Doak, 49 O.A. 2d 161 (1975)	14
State v. Hymore, 9 O.S. 2d 122 (1967)	19
State v. Jackson, 50 O.S. 2d 253 (1977)	29
State v. Osborne, 50 O.S. 2d 211 (1977)	29
State v. Phillips, 27 O.S. 2d 294 (1971)	21,23
State v. Ruechert, 561 P. 2d 850 (Kan. 1977)	28
State v. Seoul, 53 O.S. 2d 123 (1978)	29
State v. Thomas, 61 O.S. 2d 254 (1980)	29
State v. Vails, 22 O.S. 2d 103 at 105 (1970)	19
State v. Wade, 53 O.S. 2d 183 (1978)	29
State v. Williams, 51 O.S. 2d 112 (1978)	21,23, 26
State v. Wilson, 29 O.S. 2d 203 (1972)	19,20
Toledo v. Reasonover, 5 O.S. 2d 22 (1965)	26
United States v. Boylan, 620 F. 2d 359 (C/A 2,1980)	27
United States v. Cavallino, 498 F. 2d 1200 (1974)	14,15
United States v. Collins, 462 F. 2d 792 (1972)	15
United States v. Kallvig, 534 F. 2d 411 (1976)	15,18
Warden v. Hayden, 387 U.S. 294 (1967)	25
Whalen v. United States, 445 U.S. 684, 100 S. Ct. 1432 (1980)	26,27, 28
Wilson v. Henderson, 584 F. 2d 1185 (1978)	15,18
Yates v. State, 233 S.E. 2d 750 (Ga. 1977)	28

TABLE OF AUTHORITIES (Cont'd)

	Page
STATUTES:	
Ohio Revised Code, Section 2903.01, Aggravated Murder	3
Ohio Revised Code, Section 2911.01, Aggravated Robbery	3
Ohio Revised Code, Section 2929.02, Penalties for Murder	3
Ohio Revised Code, Section 2929.11, Penalties for Felony	3
Ohio Revised Code, Section 2929.41, Multiple Sentences	3,28
Ohio Revised Code, Section 2935.12, Forcible Entry in Making Arrest	4
Ohio Criminal Rule 43 (A)	4,22
CONSTITUTIONAL PROVISIONS:	
FOURTH AMENDMENT, UNITED STATES CONSTITUTION	2
FIFTH AMENDMENT, UNITED STATES CONSTITUTION	2
SIXTH AMENDMENT, UNITED STATES CONSTITUTION	2
FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION	2

QUESTIONS PRESENTED

1.) Whether police officers who have properly advised a suspect of his Miranda rights, and obtained a waiver thereof, acted properly in stopping questioning and reviewing again the Miranda warnings when the suspect indicated some confusion.

2.) Whether the trial court, after a full voir dire, is entitled to make discretionary rulings concerning whether or not a seated juror is important and should remain on the jury.

3.) Whether the due process clause of the fourteenth amendment is violated by the voluntary absence of a defendant from an in-chambers voir dire of a juror, conducted after trial commences, and in the presence of defense counsel.

4.) Whether matters not raised or preserved at trial may be raised on appeal.

5.) Whether police may make a warrantless arrest of a murder suspect in his home within hours of the commission of the murder, where the failure to act at once will allow the destruction of evidence and the escape of the felon.

6.) (A) Matters not raised at trial or on direct appeal may not be raised in the Supreme Court.

(B) Whether a state court can constitutionally impose a penalty for a felony murder and the underlying felony, where the state felony murder statute requires proof of only one of a number of possible underlying felonies in order to support a felony murder conviction.

OPINIONS BELOW

The opinion of the Ohio First District Court of Appeals and the journal entry of the Ohio Supreme Court are correctly set forth in the brief of the Petitioner.

JURISDICTION

The final order of the Supreme Court of Ohio denying review was entered March 4th, 1981. Petitioner claims jurisdiction based on 28 U.S.C., section 1257 (3), however Petitioner's 6th question presented does not raise a constitutional issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

THE FOURTH AMENDEMENT TO THE CONSTITUTION OF THE UNITED STATES:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

> The Fifth Amendment provides, in pertinent part:
>
> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

> The Sixth Amendment provides,in pertinent part:
>
> In all criminal pro secutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury . . . and to have the Assistance of Counsel for his defense.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

> The Fourteenth Amendment provides, in pertinent part:
>
> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

APPLICABLE PROVISIONS OF THE OHIO REVISED CODE:

Section 2903.01 Aggravated murder.

. . . .

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder and shall be punished as provided in section 2929.02 of the Revised Code.

Section 2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of Section 2903.01 of the Revised Code shall suffer death or be imprisoned for life.

(Life imprisonment is the only viable option here. Ohio's death penalty was declared unconstitutional by this Court in Lockett v. Ohio, 438 U.S. 586 (1978).

Section 2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in Section 2923.11 of the Revised Code on or about his person or under his control.

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

Section 2929.11 Penalties for felony.

. . . .

(B) Terms of imprisonment for felony shall be imposed as follows:

(1) For a felony of the first degree, the minimum term shall be four, five, six or seven years, and the maximum term shall be twenty-five years.

Section 2929.41 Multiple sentences.

(A) Except as provided in division (B) of this section, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment . . . .

(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:

(1) When the trial court specifies that it is to be served consecutively;

(2) When it is imposed for a violation of division (B) of Section 2917.02 of the Revised Code

(prohibiting certain acts of inmates of penal institutions), Section 2921.34 of the Revised Code (prohibiting escape of aiding escape of an inmate).

(3) When it is imposed for a new felony committed by a probationer, parolee or escapee.

Section 2935.12 Forcible entry in making arrest.

When making an arrest or executing a warrant for the arrest of a person charged with an offense, or a search warrant, the officer making the arrest may break down an outer or inner door or window of a dwelling house or other building, if, after notice he is refused admittance, but an officer executing a search warrant shall not enter a house or building not described in the warrant.

CRIMINAL RULE 43(A) RULES OF CRIMINAL PROCEDURE OF THE STATE OF OHIO.

RULE 43(A) Defendant's presence.

The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent the continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

STATEMENT OF THE CASE

a) Procedural Posture

Defendant-appellant Tyrone C. Williams was arrested on April 20th, 1977, in connection with a homicide that occurred late on April 19th, 1977. A preliminary hearing was held on April 27th, 1977 and the defendant was bound over to the Grand Jury. On May 31st, 1977 the Hamilton County Grand Jury returned indictment number B 771201. This instrument charged defendant Williams with Aggravated Murder, Aggravated Robbery and a death penalty specification. Defendant was arraigned on June 3rd, 1977, and entered a plea of not guilty. Defendant's trial to jury began on September 19th, 1977, in the courtroom of Judge Thomas Nurre. Trial concluded on September 28th, 1977 with a verdict of guilty as charged on both counts and on the specification. On April 28th, 1978, a mitigation and sentencing hearing was held. Defendant received a sentence of death on the Aggravated Murder count, and 7-25 years on the Aggravated Robbery count. On May 16th, 1980 the death sentence was reduced to life in prison. On November 19th, 1980, the First District Court of Appeals released its decision affirming appellant's conviction. On March 4th, 1981 the Ohio Supreme Court, by entry, declined to review the decision.

b) Facts

1) Discovery of crime

Shortly before midnight on April 19th, 1977, Jerry Singleton drove his car into the Speedway gas station located at the corner of Pippin and Galbraith Roads (R 729). Singleton's purpose was to buy a pack of cigarettes. Singleton noticed that although the booth appeared to be open there was no attendant in sight. After approaching the booth and looking inside Singleton saw an open cash box on the counter (R 732). He also saw a body lying on the floor in the booth. Singleton at once checked the body, found no pulse, (R 733) and called the police.

Officer Gorski of the Hamilton County Sheriff's Office responded, examined the body of the attendant, and determined that he was dead (R 798). Gorski secured the scene and

called for a detective and a supervisor. An examination of the deceased, a high school student named Jeff Stall, revealed a bullet wound in the chest and an exit wound in his back. A bullet slug was found on the floor of the service booth. The Sheriff's Office began its investigation at once, with Detective McClaren on the scene at 1:40 a.m. on the 20th to take charge (R 841). It was determined that about $166.00 was missing from the station (R 793).

The Sheriff's Office was aware that earlier in the evening of the 19th, there had been an incident involving a gun in the Skyline Acres subdivision. This subdivision is within easy walking distance of the Speedway Station, and is also in the Colerain Township area of Hamilton County. At approximately 9:00 p.m., on April 19th, two men and a juvenile had pulled a gun on a young man named Harold Enoch. (R 743). This incident occurred in the driveway of a residence occupied by Ann Heisel. The three males who had the gun at that time were Leon Leary, a juvenile, Kevin Metz and this defendant Tyrone "Chico" Williams (R 742). At the conclusion of this episode the gun was in the possession of defendant Williams (R 743-4). The Sheriff's Office decided to interview these three for informational purposes. Leon Leary was picked up first, and a short time later Kevin Ketz was arrested. The police took statements from these two, and as a result of these statements the police determined that this defendant, Tyrone Williams, should be arrested. (R 845).

2) Arrest of defendant Williams and first confession:

Five police officers went to the home of Tyrone Williams at about 7:00 a.m. on April 20th. Among these officers was Deputy Sheriff Robert Pieper. Officer Pieper knew the defendant from having previous contact with him. (R 51). After being admitted to the house with the consent of another occupant, the officers located Tyrone Williams near the back door and placed him under arrest and handcuffed him (R 53 & 847). While defendant Williams was being handcuffed Officer Pieper fully advised him as to his Miranda rights (R 53 & 847). The defendant was then removed from the house and taken to the front yard. Again Officer Pieper fully advised defendant

Williams as to his Miranda rights (R 54,55 & 847). Officer Pieper told Williams that he was wanted in connection with the robbery and homicide at the Speedway Gas Station (R 53 & 847). Pieper told Williams that there was a gun used in the crime and the police believed it was concealed in Williams' house. Pieper asked defendant Williams to cooperate and give up the gun, and further told him that in any event, the police would obtain a warrant and come back later and search for it (R 55 & 847). Williams told the police that the gun was concealed in a stereo set and he led the officers to it. (R 56 & 484). The gun was placed in an evidence bag and taken along with the officers. When defendant Williams was placed in the police cruiser he was again advised as to his Miranda rights. This time Officer Pieper read the Miranda rights to the defendant from his printed card (R 849).

After advising Williams of his rights in the car (the third time in a very short period of time) Pieper asked Williams if he wished to say anything (R 850). Defendant Williams at this time gave Pieper a statement admitting his complete involvement in the robbery-homicide at the Speedway Station. The gist of this statement was as follows (R 850).

1. Defendant Williams, Metz and Leary went to the Speedway Station fully intending to rob it.
2. The trio of robbers knew the attendant, Jeff Stahl, but did not know he was working that night.
3. Defendant Williams was carrying a .38 revolver.
4. Williams and Metz stood at the booth and ordered Stahl to pass out the money.
5. During the course of the robbery the gun went off <u>accidentally</u> and struck Stahl.
6. That he (Williams) went into the booth and determined Stahl was dead and then fled from the scene.
7. The robbers did not wear masks because they did not know Stahl would be working.

This was as far as Williams got with his statement since at this point the cruiser had arrived at Patrol Headquarters and Pieper quit talking to him (R 853).

3) Defendant's taped statement:

Upon arriving at Patrol Headquarters, Williams was turned over to Detectives McClaren and Simmons. (R 70 & 860). Defendant Williams told Simmons and McClaren that he wished to make a statement, (R 72,78) and those officers asked him if he would repeat on tape what he had told Officer Pieper. (Exhibit #2). Williams agreed to do this. At this point (7:40 a.m.) a taped statement was taken from defendant Williams. On appeal defendant contends his statement was not voluntary. The portions of the statement relative to this issue are as follows:

"Q. At this time Tyrone I am going to read you your rights. I want you to answer after me whenever I ask you a question, okay?

A. Yes.

Q. You are hereby advised that you have the right to remain silent. Do you understand that?

A. Yes.

Q. You do not have to say anything unless you choose to do so. Do you understand that?

A. Yes.

Q. Anything you do say may be used against you in a court of law. Do you understand that?

A. Yes.

Q. You have the right to consult with an attorney prior to being questioned. Do you understand that?

A. Yes, sir.

Q. You have the right to consult with an attorney prior to being questioned and you have the right to have an attorney with you during any questioning now or in the future. Do you understand that?

A. Yes, I understand.

Q. If you cannot afford an attorney you will be provided with one without cost prior to any questioning. Do you understand?

A. Yeah.

Q. If you do not have an attorney presently available, you have the right to remain silent until you have had an opportunity to consult with one. Do you understand?

A. Yes, sir.

Q. You can decide at any time to exercise these rights and not answer any questions

or make any statements. Do you understand that?

A. Yes, sir.

Q. If you decide to answer questions now, with or without a lawyer, you still have the right to stop the questioning at any time for the purpose of consulting a lawyer. Do you understand that?

A. Yes.

Q. With those rights in mind do you want to talk to us at this time?

A. Depending on what?

Q. Did you understand what I just said?

A. Yes.

Q. Do you wish to talk to us at this time?

A. I would like to have an attorney, you know. (unintelligible . . . see p. 20 infra)

Q. Okay Tyrone, that is your privilege of course. Your rights were explained to you by the patrolman also weren't they?

A. Yes, sir.

Q. Okay, you understood the part where it said you could start to talk to us and stop at any time you wanted to, didn't you?

A. Yes.

Q. Okay, you understood each and all of your rights?

A. I surely did.

Q. Okay, is it your choice then that you wish not to talk to us at this time or would you like to start to talk to us or . . .

A. I know I can say I didn't plan no robbery. I have no idea of it at all.

Q. Well we have to . . . , in other words we don't know what we are talking about really or what you are trying to tell us until we can hear your side of the story which we have heard from the other two guy's side of the story but we don't know just exactly what your side is. We are completely in the dark sitting here like this. So if you wish to talk to us as your rights said, you can stop at any time or you can have an attorney. That's your perogative.

A. (defendant gives statement.)"

At this point the defendant gave a statement which was mostly exculpatory in nature. In the statement defendant Williams also stated he voluntarily gave the gun to the arresting officers, and that his taped statement was being given voluntarily.

4) Jury contact with witness; voir dire of certain jurors:

After a jury was impanelled, and before evidence was presented the jury was taken for a view of the scene. This occurred on a Friday afternoon. When trial reconvened on Monday, defense counsel moved for a mistrial based on alleged conversation between the jurors and the manager of the Speedway Station, who was to be a witness at trial. (R 701). The station manager allegedly had directed the jurors' attention to the dent in the wall made by the bullet after it passed through the body of Jeff Stahl. This was also one of the things which the bailiff was pointing out to the jurors (R 702).

The trial court asked the jury if anyone had heard the remark at the view and five (5) jurors indicated that they had (R 705). All five of these jurors were voir dired by the trial court in chambers in the presence of the Judge, the prosecutor and defense counsel (R 705 et seq.) There is a reporter's note in the record (R 705) that defendant was not present. Petitioner's brief repeatedly uses the word "Excluded" to describe his absence. In fact, defendant was present in the courtroom when this occurred. Neither he nor his counsel requested he be brought into chambers. All five of the jurors indicated that they were not affected in any way by what occurred, and indicated that they could return an impartial verdict (R 705-713).

On appeal defendant contends that one of those five jurors, Juror Kopp, should have been excused, because her voir dire revealed she could not be impartial. The voir dire of Juror Kopp is as follows:

"COURT: Miss Kopp.

KOPP : Well, I just heard someone make a statement in there.

COURT: Who?

KOPP: This service station attendant that was inside that little cubicle.

COURT: He made a statement?

KOPP: Yeah. That's all.

COURT: What was the statement?

KOPP: About where the bullet hole was.

COURT: About where the hole was?

MR. GAINES : She stated bullet hole, I believe, Your Honor.

COURT: Is there anything about what was said that would prejudice you in any way?

KOPP: No, I don't believe so.

COURT: Will you set aside anything you heard from your mind and not be influenced by it?

KOPP: Yes.

COURT: Okay. Miss Kopp, I'm going to ask that you step outside. Go to the jury room.

MR. CARR: Just a minute, Miss Kopp. I do want to instruct you that what was said was not evidence and it should not be considered in any way and you have assured me that you will not consider it in any way, is that correct? Would you say yes for the record?

GAINES: I think the record should reflect that the prospective juror shrugged her shoulders.

COURT: Will you disregard it and not consider it in any way?

KOPP: Yes, I suppose so.

COURT: Okay. Thank you.

GAINES: I believe the answer was, yes, I suppose so. I would like the record to reflect that.

COURT: Ma'am, did you want to say something?

KOPP: I don't know. I'm confused about the whole thing.

COURT: Well, I'm asking you to set aside anything you have heard which you said you would do originally when you were accepted as a juror. Will you do that?

KOPP: Yes.

COURT: Thank you.

GAINES: Your Honor, I hate to . . . the juror seems to have some reservations. I don't know.

COURT: She's indicated she will . . ." (R 707)

As can be seen the trial court was quite careful to make sure juror Kopp could be impartial. The statement by the juror to the effect that "I'm confused by the whole thing . . ." did not refer to her ability to be impartial, but to the procedure which was being followed. Other factual issues will be developed under the appropriate arguments.

REASONS FOR DENYING THE WRIT

1. Where a suspect has been advised of his Miranda rights and gives a statement, and subsequently agrees to repeat the statement on tape, and after being again advised of his rights on tape indicates some confusion, the officers may properly again review the suspect's Miranda rights with him, and continue questioning if the suspect desires to proceed.

Defendant contends that the trial court erred in overruling his motion to suppress. Defendant wanted to suppress three specific items of evidence at trial.

1. The murder weapon,
2. Defendant's oral confession to Officer Pieper,
3. Defendant's taped confession.(Exhibit #2 at the Motion to Suppress.)

There is no basis whatsoever in the record to suppress either the murder weapon or the oral confession. The testimony at the motion to suppress indicated that defendant Williams was twice advised of his Miranda rights and then voluntarily showed police where the gun was concealed. Defendant even states in his taped confession that he voluntarily revealed the gun's hiding place to the police. With regard to defendant's oral statement to Officer Pieper the record reveals that defendant was given his Miranda warnings three times before any attempt was made to question him. Only after these warnings did defendant give the statement to Officer Pieper. With regard to the gun and the oral statement there is no basis at all to reverse the trial court's ruling. At best defendant raises only issues of credibility which were resolved against him by the trial court and cannot be challenged on appeal. Burks v. United States, 98 S. Ct. 2141 (1978); State v. Antill, 176 O.S. 61 (1964); State v. DeHass, 10 O.S. 2d 230 (1967). It is submitted that the murder weapon and the oral confession to Officer Pieper were both properly admitted into evidence.

The third item of evidence at issue, defendant's taped statement, presents more difficult issues. Briefly stated, the facts are as follows. The defendant was arrested, advised of his rights and gave an oral statement to Officer Pieper while being transported to the Sheriff's Office. Upon arrival at the Sheriff's Office defendant Williams was turned

over to Detectives McClaren and Simmons. Defendant Williams told these officers that he wanted to give a statement (R 72,78). These officers then began to take a taped statement from Williams. The first portion of the tape is a full, complete and careful covering of the Miranda rights. Miranda v. Arizona, 384 U.S. 436 (1966). Then the following exchange occurs.

"Q. With these rights in mind do you want to talk to us at this time?

A. Depending on what?

Q. Did you understand what I just said?

A. Yes.

Q. Do you wish to talk to us at this time?

A. I would like to have an attorney, you know. (There is an inaudible answer here which may or may not be 'I don't have one' or 'I can't afford one'. In view of the audible answer the exact wording of this portion is insignificant.)

Q. Okay Tyrone, that is your privilege of course. Your rights were explained to you by the patrolman also, weren't they?

A. Yes, sir.

Q. Okay, you understood the part where it said that you could start to talk to us and stop at any time you wanted to, didn't you?

A. Yes.

Q. Okay, you understood each and all of your rights?

A. I surely did.

Q. Okay, is it your choice then that you wish not to talk to us at this time or would you like to start to talk to us or . . .

Q. Well we have to . . ., in other words we don't know what we are talking about really or what you are trying to tell us until we can hear your side of the story which we have heard from the other two guys' side of the story but we don't know just exactly what your side is. We are completely in the dark sitting here like this. So if you wish to talk to us as your rights said you can and stop at any time or you can have an attorney. That's your perogative.

A. (defendant begins to give statement.)

Appellant contends that once he asked for counsel all questioning must cease until he has counsel. Appellant feels that there is a per se rule that calls for exclusion in a

case like this. It is appellee's position that in the context of this statement, where defendant first told police that he wished to give a statement, that what occurred here was entirely proper. The defendant indicated some confusion or misunderstanding of his rights. The officer did not attempt to continue questioning, but instead went back over the rights with the defendant. This was the correct procedure to follow in this situation. The defendant had expressed contradictory positions, and the officer went back over the rights to ascertain just what the defendant wanted to do. There are two possible interpretations of what defendant Williams meant when he said he would like an attorney. The most likely interpretation, in view of the fact that he had told the officers he wanted to give a statement, is that Williams was momentarily confused over what was occurring, or had said something he did not intend. The second possible interpretation is that Williams was equivocating back and forth over his desire to give a statement. In either case the officer's response of going back over Williams' right to counsel with him was the correct response. Once defendant Williams mentioned a desire for counsel (which contradicted his earlier statement) interrogation ceased and the officers reviewed with Williams his right to counsel. This was done in a non-coercive manner, and was reaffirmed to Williams even after he began to talk. (See Exhibit 2 at motion, page 2, as set out above.)

Even after a defendant asserts one of his Miranda rights there is no per se rule which prevents further questioning. Michigan v. Moseley, 423 U.S. 96 (1975): Hill v. Whealon, 490 F. 2d 629 (1972); Jenning v. United States, 391 F. 2d 512 (1968); State v. Doak, 49 O.A. 2d 161 (1975). The real test to be applied in such a situation (as here) has been stated as follows:

> ". . . whether the prosecution has sustained its heavy burden of establishing that (the defendant) was fully informed of and understood his rights and whether, having once expressed his decision to exercise them, he later changed his mind and knowingly and understandingly declined to exercise them." United States v. Cavallino, 498 F. 2d 1200 (1974)

The time frame in which such reconsideration is urged is not a crucial factor. Wilson v. Henderson, 584 F. 2d 1185 (1978). The Cavallino case, supra, and United States v. Kallvig, 534 F. 2d 411 (1976) both involved requests for counsel followed by continued questioning, and in both cases the courts refused to apply a rule of per se exclusion. A claim identical to that raised here by appellant was considered and rejected in United States v. Collins, 462 F. 2d 792 (1972) cert. denied, 93 S. Ct. 343. Headnote #3 and #4 in the Reporter read as follows:

> 3. That defendant, who was considerately was several times asked to reconsider and at one time exhorted to re-evaluate his decision not to talk did not render his confession inadmissible on grounds that there had been "refusal of the agents to terminate their interrogation of defendant despite his repeated requests that they do so."
>
> 4. If reconsideration of accused's decision not to talk is urged in careful, non-coercive manner at not too great length and in context that accused's assertion of his right not to speak will be honored, it does not violate requirement that police not ignore an accused's stated wish to have interrogation cease.

The procedure suggested in Collins was exactly what was followed here. Petitioner's rights to counsel were reviewed and petitioner was told the choice was his, that his desires would be honored. The petitioner here had expressed contradictory positions. First he had waived counsel and confessed to Officer Pieper and requested to give a statement to Officers McClaren and Simmons. Then defendant mentioned a desire for counsel. In view of these contradictory positions the officers ceased questioning and reviewed defendant's subsequent confession was properly admitted.

Petitioner contends that the decision of the Supreme Court in Rhode Island v. Innis, _____ U.S. _____, 100 S. Ct. 1682 (1980) is supportive of his claim that his taped confession should be suppressed. It is the position of appellee that Innis is not in point, and is not helpful to a resolution of the issues in this case.

Petitioner feels that the issue here is that where a

request for counsel is clearly articulated and police ask questions designed to get an answer that Innis calls for suppression. To begin with there is no "clearly articulated" request for counsel's presence. The language involving the so called request for counsel is so low as to be inaudible and is practically incomprehensible.

Petitioner seeks to narrow the issue presented to a consideration of only one question and answer. It is the position of respondent that the entire background of the statement must be looked at to see just what petitioner intended by his remark and whether the police response was proper. This petitioner had already been advised of his rights three times, had given police the murder weapon, and had already given a complete oral confession to the crime. The tape recorded statement at issue here was being taken at the specific request of defendant (R 72-78), who wanted to tell his side of the story since his co-defendants had already spoken. Against this background it was entirely proper for the police to review defendant's rights with him when he suddenly requested counsel. It was entirely possible that he had not meant to say what he did, and police were entitled to review his rights with him and ascertain whether or not he wished to give a statement.

The Innis case is not in point here. Innis involved a suspect arrested for murder, who, while being transported by police, overheard remarks concerning their fears that little children would find the murder gun and harm themselves. Upon hearing these remarks the defendant decided to tell the police where the murder weapon was concealed. This case (Innis) involved facts remarkably similar to those of the 'christian burial speech' in Brewer v. Williams, 430 U.S. 387 (1977). The holding in Innis is quite simply that police cannot avoid the strictures of Miranda by using methods which at first glance do not seem to be interrogation. The whole point of Innis was to define just what is interrogation. This has no bearing on defendant Williams. He was in custody, at a police station, and was being advised of his rights.

The issue in this case is whether a defendant who makes a request inconsistent with his whole attitude can be questioned as to how he desires to proceed. In essence the issue here is one of clarification.

Defendant also asserts that the use by the police of the "old ploy" of stating that co-defendants have spoken was improper and tricked him into speaking. On examination of the transcript it is revealed that this remark was not made until after defendant had already begun to talk, and had in fact given a statement to Officer Pieper. Further, the remark was correct, both co-defendants had spoken to police and incriminated defendant Williams. If telling the truth is an improper "ploy" there is not much left to use to elicit statements from suspects. In fact, the police were totally candid with defendant, who now urges that society be penalized for the constable's honesty. It is submitted that the taped confession was properly admitted.

It is the position of appellee that even if the taped statement was improperly admitted into evidence that such error was harmless beyond a reasonable doubt. Thus Court, in Chapman v. California, 386 U.S. 18 (1967), held that even constitutional error can be harmless if a Court finds beyond a reasonable doubt that defendant would have been convicted even if error had not intervened. Even if a violation of Miranda is constitutional error, there can be no doubt that such error in this case was harmless. The test for defining harmless error has been stated as follows:

> "If the error alleged is constitutional in nature and if the court finds that there is overwhelming evidence of the defendant-appellant's guilt, aside from the disputed material, then it must hold that the error is not prejudicial but harmless beyond a reasonable doubt and affirm the judgment of the trial court." State v. Davis, 44 O.A. 2d 335 (1975).

In the present case, even disregarding defendant's taped confession, which was exculpatory in nature and supported defendant's claim of accident, there was overwhelming evidence of guilt. The record contained the following evidence independent of the taped confession, which support defendant's

conviction

1. Defendant's oral confession to Officer Pieper.

2. Testimony that defendant gave the murder weapon to the police.

3. Testimony that defendant had the murder weapon earlier in the evening on April 19th.

4. Defendant's admission to Annette Wright that he shot the "dude" because he made him mad. (R 816)

5. Defendant's admission to Evelyn Bouragge that he shot someone. (R 827).

6. Defendant's admission to Michelle Anderson that he shot the "dude" because he made him mad. (R 837).

7. Evidence that the shot could not have been accidentally fired.

8. Defendant took the stand and admitted the shooting but claimed it was accidental.

This evidence alone was more than sufficient to sustain defendant's conviction. It might be further noted that even defense counsel thought the questioned taped statement was exculpatory since he insisted that the tape be played for the jury during deliberations (R 1029).

Two cases involving identical issues are Wilson v. Henderson, 584 F. 2d 1185 (1978) and United States v. Kallvig, 534 F. 2d 411 (1976). Both cases involved statements taken after a defendant had requested counsel and in both cases the court stated that even if the admission of the statements was error, it was harmless error. In Wilson the Court stated:

> "Even if the admission of the statement to Cullen had been improper, we would be inclined to find the error harmless. (citation omitted). The allegedly tainted evidence did no more than place Wilson at the scene of the crime, a fact which was confirmed by the testimony of several eyewitnesses. The statement, therefore, was cumulative evidence and its admission was harmless beyond a reasonable doubt."

The same rationale applies in the present case. Defendant's first confession to Officer Pieper was much more incriminating of defendant Williams and was properly before the jury. Also before the jury were the defendant's admissions to three separate witnesses and the defendant's own testimony. In view of this, any error in admitting the taped statement was harmless beyond a reasonable doubt.

2. A trial court's ruling on a challenge for cause is a discretionary matter, and the burden is on the party challenging the juror to show the actual existence of an opinion which renders such a jury unfit. Absent such a showing a trial court's ruling will not be disturbed on appeal.

After the jury view was conducted but prior to the taking of any evidence, it was called to the court's attention that five jurors had contact with an unauthorized person at the view. In response to this the Court conducted an in-chambers voir dire of the five jurors to determine if they could remain impartial. Petitioner contends that one of these jurors, a Mrs. Kopp, should have been excused for cause. Of course, the unauthorized contact was of such an insignificant nature that it is hard to understand the furor now being raised. One of the purposes of the view was to see the bullet scar in the interior wall of the service station booth. The booth was quite small and only a few people could enter at one time. The bailiff was supposed to point this out to the jurors. The unauthorized contact consisted of the service station manager pointing the scar out instead of the bailiff. That was the sum total of the unauthorized "contact".

In response to the defendant's motion for mistrial the trial court conducted a voir dire of the five jurors. Petitioner claims that one of these jurors should have been excused for cause. The voir dire of the challenged juror is set out in the factual statement, earlier in this brief. Clearly it does not show a juror who is impartial or biased. The Ohio law in this area is clear.

The decision as to whether a juror should be excused for cause is for the sound discretion of the trial court. A trial court's ruling on a challenge for cause will not be overturned unless it appears that the court has clearly abused its discretion. State v. Wilson, 29 O.S. 2d 203(1972); State v. Vails, 22 O.S. 2d 103 at 105 (1970). This is in accord with the general rule of review as to any discretionary rulings by the trial court. See, for example, State v. Hymore, 9 O.S. 2d 122 (1967) (admission of evidence). This defendant argues here that the trial court erred in allowing juror Kopp to remain on the jury. In order to

sustain this argument defendant must show a clear, patent abuse of discretion on the part of the trial court. In resolving this issue the appellate courts have been directed not to "second guess" the trial court. State v. Wilson, 29 O.S. 2d 203 at 211 (1972).

The Ohio law cited above is also in conformity with federal law. Reynolds v. United States, 98 U.S. 145 (1898); Holt v. United States, 218 U.S. 245 ( ); Irvin v. Dowd, 366 U.S. 717 (1961). These cases hold that the trial court's ruling on a challenge for cause will be set aside only where the error or prejudice is manifest. Furthermore, the burden is on the one challenging the juror to make an affirmative showing that the juror cannot be impartial. The record here completely fails to substantiate the claims of the petitioner.

In examining the voir dire of juror Kopp the court can see that her use of the phrase: "I'm confused about the whole thing" (707) was in reference to the unusual voir dire that was being conducted, not about her ability to be impartial. When asked by the court if she could set aside everything she had heard at the view she replied, "yes". Earlier she had told the court that she "didn't believe" she would be prejudicial and that she "supposed" she could disregard what she had heard. Depending on how such phrases are used, tone of voice, demeanor, etc., they can be solid affirmations or equivocations. The trial court carefully questioned juror Kopp, listened to her, and observed her as she spoke. The record here supports the trial court's decision to leave her on the jury. This is particularly true when the record of the entire voir dire of juror Kopp is reviewed. In making his decision the trial court is entitled to rely upon all his knowledge as to this juror, including that gained from the initial voir dire. During her original voir dire juror Kopp unequivocably indicated she would disregard anything she heard outside the courtroom and decide the case only on the evidence, (R 497) and that there was nothing which would prevent her from being impartial (R 501). Interestingly, juror Kopp indicated she was opposed to the death penalty, (R 495) which would seem to indicate an intention to be very fair. During her initial voir dire,

defense counsel examined this juror and raised no challenge. It is submitted that the trial court, with this initial voir dire in mind, and the pertinent answers to the subsequent voir dire, did not err in leaving juror Kopp on the jury.

3. The voluntary absence of a defendant from an in-camera voir dire of a juror, where defense counsel is present, is not a violation of fourteenth amendment guarantees of due process.

After trial commenced (a jury had been empaneled and a jury view conducted), in response to defendant's motion for mistrial, the trial court conducted an in-camera voir dire of five jurors. Defense counsel was present and participated. A court reporter's notes indicate defendant Williams was not present. There is nothing in the record to indicate defendant was excluded from this hearing. Defense counsel never requested that petitioner be brought in, and never objected to his absence. In view of this it can only be assumed that petitioner's absence was voluntary. Thus counsel's constant repetition of the claim that petitioner was "excluded" is a misstatement of the facts. He was not excluded, his trial counsel simply did not bring him in. Since no objection was raised at the trial level, Ohio law bars this issue from being considered on appeal. State v. Childs, 14 O.S. 2d 56 (1968); State v. Williams, 51 O.S. 2d 112 (1978). Sylabus paragraph number one in Williams states:

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."

This rule is particularly appropriate here since the trial court could have, if requested, brought the defendant into chambers. There is no reason whatsoever to assume such a request would be denied. The failure to object was a waiver, and this waiver rule applied even if the alledged error is constitutional in nature. State v. Phillips, 27 O.S. 2d 294 (1971); State v. Davis, 1 O.S. 2d 28 (1964). This court has always honored state contemporaneous objection requirements. Mapp v. Ohio, 367 U.S. 643, n. 9 (1961). It is submitted that this matter is not properly raised on appeal.

Ohio Crim. R. 43 (A), Defendant's presence, provides that once trial has commenced, it may proceed in the defendant's voluntary absence. Since no one excluded the petitioner, and since trial counsel did not request his presence, it must be assumed his absence was voluntary, and the voir dire properly conducted in his absence.

Even if petitioner should have been present his absence was surely harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). As the Ohio Appellate Court pointed out:

> "The instant case, however, can be distinguished from these cases in that the incident in question took place early in the trial, before any evidence was presented, not during the critical stage of jury deliberations. All that transpired at the hearing is on the record, and we have already ruled that the court did not abuse its discretion in allowing the trial to continue with the original jurors."

There is no real indication as to how petitioner would have aided counsel in conducting the voir dire. Further, the subject matter of the voir dire concerned factual material of which petitioner would have no knowledge.

In Nevels v. Parrott, 596 F. 2d 344 (1979) the Eighth Circuit held that the defendant's absence in a similar situation was harmless beyond a reasonable doubt because of the showing that the juror remained impartial. Such a showing was clearly made here. First of all the "unauthorized conduct" was absolutely and undeniably not something that would affect a juror's impartiality. Quite simply it is being blown completely out of proportion and context. Secondly, the trial court conducted a voir dire of this juror and made a finding of continued impartiality. Respondent suggest that any error was harmless beyond a reasonable doubt.

4. Matters not raised at trial will not be considered by an appellate court.

5. Police officers may make a warrantless arrest of a murder suspect in his home within hours of the commission of the murder, where the failure to act at once will allow destruction of evidence and the escape of the felon.

(ARGUED TOGETHER)

Petitioner contends that he was arrested in his home without a warrant. The arrest occurred in April of 1977. Sometime after this case was tried this court released its decision in Payton v. New York, 100 S. Ct. 1371 (1980). The holding in Payton was that warrants are required before a suspect may be arrested in his home. Defendant urges that since he was arrested without a warrant that his motion to suppress should have been granted. Defendant concedes in his brief that this issue was not raised at trial. It is the position of the state that having failed to raise this issue at trial defendant may not now raise it on appeal. Ohio law in this area is clear, see for example, State v. Williams, 51 O.S. 2d 112 (1978); State v. Childs, 14 O.S. 2d 56 (1968). This waiver rule also applied to constitutional issues. State v. Davis, 1 O.S. 2d 28 (1964); State v. Phillips, 27 O.S. 2d 294 (1971). In Mapp v. Ohio, 367 U.S. 643 (1961) the court stated in footnote 9:

> "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

This is direct acceptance and approval of the waiver rule. An issue must be raised at trial or it will be deemed waived on appeal. Defendant, relying on O'Connor v. Ohio, 385 U.S. 92 (1966), argues in his brief, however, that he was not required to be clairvoyant, that he could not anticipate Payton and that therefore he is excused from raising an objection at trial. In support of his position defendant states that the Payton case "changes the law". This surely cannot be right. Appellee has always thought that "law" was made and changed by the legislature, and that it was the court's function to interpret law, and measure it against the constitution.

If Payton truly "changed" the law, then how could it be applicable to a case which was tried 2½ years before Payton

was decided? The only way Payton could be applicable in this case is if it was a constitutional ruling (which it is) and is applicable to pending cases. If Payton is indeed based on the constitution (which it is) then its holding has in reality been good constitutional law all along. This being so defendant is not excused from objecting at trial, and his failure to do so amounts to a waiver.

One other matter with regard to this issue. Since the question was not raised at trial there obviously was no record made of facts pertinent to this issue. To be honest appellee cannot concede, from the record, for a certainty, that this was in fact a warrantless arrest. Nor was any purposeful record made as to any exigent circumstances which may have justified a warrantless arrest. This points out the purpose and necessity for raising this issue at trial.

Even if this issue has been properly preserved for trial it is without merit. The warrantless arrest in the present case was justified by exigent circumstances. The defendant in Payton was arrested after two days of intensive police investigation. The defendant in Riddick (the companion case to Payton) was arrested 3 years after the crime was committed. On the facts then a warrant could have been obtained in both cases. The Supreme Court specifically held in Payton that some warrantless arrests in homes would be proper based on "exigent circumstances".

> "Before addressing the narrow question presented by these appeals, we put to one side other related problems that ate not presented today. Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The Court of Appeals majority treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant' and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation described in our cases as 'exigent circumstances' that would justify a warrantless entry into a home for the purpose of either arrest or search."

It is the position of appellee that the warrantless arrest of defendant Williams was proper, based on the doctrine of

exigent circumstances.

Defendant Williams was arrested at 6:30 a.m., at most two hours after his co-defendants incriminated him. When arrested Williams was about to leave the back door of his house. Both of the co-defendants lived within blocks of the petitioner and it was only a matter of time until news of their arrest filtered down to him and he learned of their arrest. In a fast breaking case such as this police had to act quickly or the defendant could be alerted and flee, or conceal necessary evidence such as the gun and stolen merchandise. These are exigent circumstances which justified a warrantless arrest. Warden v. Hayden, 387 U.S. 294 (1967). The need for quick action has been recognized by the court to obviate the need to follow constitutional requirements. Mincey v. Arizona, 437 U.S. 385 (1978). In the present case the necessity to act at once overrode the warrant requirement. (Petitioner's assertion in his brief that a warrant could have been obtained in minutes is incredible and simply not true.)

Finally, it is submitted that the statements at issue here were not the product of the arrest, (be it legal or not). In both Payton and Riddick the court suppressed physical evidence found in the defendant's home at the time of the arrest. Obviously these items were found because of the arrest. Neither Payton nor Riddick involved suppression of a confession. The confession here was not the product of the warrantless arrest. There was ample probable cause to arrest the defendant and a warrant could have been obtained. Once arrested this defendant was going to be questioned. The confession was the product of the questioning, and the questioning was initiated only after the defendant had been thrice advised of his rights. It is the position of the state that the confession was not the product of the arrest, and that the Miranda warnings, repeatedly given, were an intervening factor which removed any taint from the supposedly illegal arrest. This is particularly true here since the flaw in the arrest is merely the failure to obtain a warrant. There is no challenge to the existence of probable cause.

Petitioner argues in his brief that this case squarely

presents the issue left open by Payton and Riddick concerning consent of others to enter and a request that police leave. This case is not the appropriate vehicle to raise on review these issues. Since the matter was not raised by petitioner at trial, no evidentiary record of these issues was made. Thus this case is not one ripe for review in this regard.

4. (a) Matters not raised at trial or on direct appeal will not be considered by a higher level appellate court.

(b) The states may legislatively provide for consecutive sentences for a felony murder and the underlying felony, where the state felony murder statute requires proof of only one of a number of possible underlying felonies in order to support a felony murder conviction.

a.) Petitioner urges that he cannot be sentenced consecutively on both a felony murder and the underlying felony. This issue was not raised at trial, nor was it raised on direct appeal. It is the position of respondent that these failures prevent the raising of this issue now.

Ohio appellate practice has long recognized and followed the waiver rule, particularly where the issue is not raised in direct appeal to the Court of Appeals. Toledo v. Reasonover, 5 O.S. 2d 22 (1965); State v. Williams, 51 O.S. 2d 112 (1977); State v. Cornelly, 56 O.S. 2d 1 (1978). This Court has also recognized the right of the States to impose a contemporaneous objection rule. Mapp v. Ohio, 367 U.S. 643 (1961). Further, the failure of petitioner to raise this issue in the Ohio Appellate Court is a bar to its consideration by this Court. Cardinale v. Louisiana, 394 U.S. 437 (1969).

b.) Petitioner contends that he cannot constitutionally be sentenced for both felony murder and the underlying felony. In support of this proposition petitioner relies on Whalen v. United States, 445 U.S. 684, 100 S. Ct. 1432 (1980). Petitioner feels that Whalen establishes a constitutional double-jeopardy rule which prevents the imposition of sentence for both felony-murder and the underlying felony. It is the position of the respondent that Whalen is not a constitutional decision, but instead involves merely a

question of statutory construction. Further, under the test set forth in Blockburger v. United States, 284 U.S. 299 (1932) there is no constitutional bar to the imposition of sentence on both a felony murder and on the underlying felony. See also Illinois v. Vitale, 100 S. Ct. 2260 (1980).

The Whalen decision involved the interpretation of the Washington, D.C. felony murder statute. In essence the court determined that congress, when it enacted the statute, did not intend to authorize punishment for both the murder and the felony. In Whalen this Court framed the issue as follows:

> "In the present case, therefore, if congress has not authorized cumulative punishments for rape and an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced."

Obviously the Court in Whalen saw this not as a constitutional issue, but rather one of legislative intent in drafting criminal legislation. This belief is reinforced by the following langauge from the dissenting opinion of Justice Rehnquist.

> "Because the question before us is purely one of statutory construction . . . ."

In the cases decided since Whalen which contain references thereto, the Courts are unanimous in finding that Whalen is not a constitutional double jeopardy case, but is rather a case dealing with statutory construction. see United States v. Boylan, 620 F. 2d 359 (C/A 2, 1980); Mayes v. Sowders, 621 F. 2d 850 (C/A 6, 1980); Brown v. Alabama, 619 F. 2d 376 (C/A 5, 1980). In Boylan, supra, the defendant was convicted and sentenced on a R.I.C.O. count and on the underlying felony. The Court therein held that Whalen did not prevent such a sentence, and that such a sentence was permissible because that was the intent of the legislature. In Busic v. United States, ____ U.S. ____, 100 S. Ct. 1747 (1980), Justice Blackman authored a concurring opinion, joined in by Chief Justice Burger, which states that, in reference to Whalen, where a defendant is sentenced at a single proceeding the only question is what penalty does the legislature intend to be imposed. In sum, Whalen does not

announce a constitutionally based rule which prevents imposition of consecutive (cumulative sentence for felony murder and the underlying felony. Instead, Whalen finds that such consecutive sentences are permissible if they are legislatively mandated. Most states do in fact provide for such sentencing, see, for example, State v. Ruechert, 561 P. 2d 850 (Kan. 1977); Com. v. Sparrow, 370 A. 2d 712 (Pa. 1977); People v. Burton, 6 Cal. 3rd 375 (1975); Yates v. State, 233 S.E. 2d 750 (Ga.,1977).

Likewise the consecutive sentencing here does not run afoul of the rule in Blockburger v. United States, 284 U.S. 299 (1932). Blockburger adopts a "required evidence" rule rather than an "actual evidence" rule in analyzing double jeopardy issues. In applying this test the statutory elements of the crime are to be examined, not the actual evidence used at a particular trial. In the present case the aggravated murder conviction requires proof of a robbery, an element not found in the underlying felony. The felony of aggravated robbery requires proof of that specific act; while aggravated murder merely requires proof of a felony, not any particular felony. Thus the required evidence for aggravated murder and the underlying felony are not identical, and multiple conviction and sentence is proper.

Petitioner's citation to North Carolina v. Pearce, 395 U.S. 711 (1969) is not in point. Defendant is not being punichsed twice for the same act. He is being punished once for the aggravated robbery and once for the homicide. These are separate criminal acts, each committed with a separate animus. The legislature may properly intend separate punishment for each.

In analyzing the sentence in this petitioner's case the issues are twofold. First, did the legislature intend to provide for consecutive (cumulative) sentencing, and secondly, are the two crimes distinguishable under the "required evidence" rule of Blockburger. In determining the legislative intent as to sentencing the appropriate statute is Ohio Revised Code 2929.41, Multiple Sentences. That section specifically provides for the imposition of multiple sentences and sets forth a comprehensive scheme dealing with

various permissible minimum and maximum sentences in such situations. Ohio case law has implicitly accepted the imposition of such sentences. State v. Adams, 53 O.S. 2d 223 (1978); State v. Seoul, 53 O.S. 2d 123 (1978); State v. Wade, 53 O.S. 2d 183 (1978); State v. Jackson, 50 O.S. 2d 253(1977); State v. Osborne, 50 O.S. 2d 211 (1977). Finally in State v. Thomas, 61 O.S. 2d 254 (1980) the Ohio Supreme Court reviewed relevant Ohio and Federal law and found that multiple punishments were not barred in a robbery-involuntary manslaughter situation. In Thomas the Ohio Supreme Court indicated that in situations such as this that multiple sentences were correct. (61 O.S. 2d at 261). The Court also used the Blockburger required evidence rule in distinguishing the two crimes. It is submitted that both legislative intent and case law interpretation thereof support the imposition of consecutive sentences for felony murder and the underlying felony in Ohio. This indicates the sentences herein are not barred by the Whalen decision.

CONCLUSION

It is submitted that certiorari should not be granted in this case. Rarely does a single appeal present so many issues which were not raised in the lower courts, Petitioner's litany of the violations of his rights overlooks the fact that he, in cold blood, gunned down an innocent high school student and then proceeded to brag to numerous friends (all of whom testified at trial) that he "wasted some dude" because he made him mad. In fact there was no Miranda violation. The police scrupulously followed the law in that area. In fact this case was tried two years before Payton was ever decided. Thus petitioner's claims of police flagrantly trampeling rights secured by that case must be seen for the exageration that they are. An examination of the facts of this case shows that the Courts have scrupulously protected this defendant's rights at all times. The record here contains overwhelming evidence of defendant's guilt, including a prior unchallenged, confession and numerous admissions of guilt by the defendant to his friends. The issues raised by petitioner are not fresh or novel. In fact they have already been decided by this Court in earlier decisions; which decisions were followed by the lower Courts. It is submitted that certiorari should not be granted.

Respectfully submitted,

Simon L. Leis, Jr.
Prosecuting Attorney

William E. Breyer
Trial Counsel

Leonard Kirschner
Chief Ass't Prosecuting Attorney
Appellate Division

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Respondent